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MICHAEL RODAK, JR

In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2060

CARL M. AUSTIN, et al., *Appellants,*

v.

STATE OF NEW HAMPSHIRE, et al., *Appellees*

On Appeal from the Supreme
Court of the State of New Hampshire

MOTION TO DISMISS

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The Appellee moves the Court to dismiss the appeal herein on the ground that the questions presented are so unsubstantial as not to need further argument.

I.

STATEMENT

This case was brought by three residents of the State of Maine who were employed in the State of New Hampshire during the taxable year 1970. Pursuant to New Hampshire Revised Statutes Annotated [RSA] 77-B, their employers withheld from

their wages and salaries the amount of tax imposed upon their New Hampshire derived income as defined in RSA 77-B:1 (X).

The amount of tax so imposed by RSA 77-B:2 (II) was, under the provisions thereof, made equal to the amount of tax which would have been due the State of Maine under its income tax law had the income been earned in Maine.

Since the Maine tax law provides a credit against the Maine income tax for the amount of income subject to Maine tax which is also taxed by another jurisdiction, e.g., New Hampshire, the plaintiffs' tax-load was unaltered by the operation of RSA 77-B. Rather, that amount of tax was diverted to New Hampshire which would have been paid to Maine in the absence of the New Hampshire taxing statute.

The plaintiffs filed both New Hampshire and Maine tax returns for the year 1970. In December, 1971, the plaintiffs caused a petition for declaratory judgement to be filed. The defendant moved to dismiss, which motion was denied, exceptions noted, and all issues raised were transferred without ruling to the New Hampshire Supreme Court on September 20, 1972.

The New Hampshire Supreme Court issued a final judgement for the defendant declaring RSA 77-B to be not violative of either the privileges and immunities or due process clauses of the United States Constitution.

II.

ARGUMENT

The decision of the Supreme Court of New Hampshire is plainly correct. The case presented below by the appellants herein raises no constitutional issues not previously settled by this Court.

The taxation by a state of non-residents, *per se*, involves no violation of the privileges and immunities clause of the Federal Constitution. *Shaffer* v. *Carter*, 252 U.S. 37, 40 S. Ct. 221 (1920). In that case it was said:

> That a State, consistently with the Federal Constitution, may not prohibit the citizens of other States from carrying on legitimate business within its borders like its own citizens, of course is granted; but it does not follow that the business of non-residents may not be required to make a ratable contribution in taxes for the support of the government. On the contrary, the very fact that a citizen of one State has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such non-resident, although not personally yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter State.

The key phrase here is "not more onerous in effect. . . ." So long as the ultimate burden upon residents and non-residents is substantially unaltered by the incidence of the tax, there is no constitutional infirmity. As pointed out above, there is no substantial change in tax burden upon either residents or non-residents attributable to the operation of RSA 77-B. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60, 40 S. Ct. 228 (1920), relied upon by the appellants, is not compelling here. The New York income tax law under consideration in that case had the unavoidable effect of increasing the total tax burden of the non-residents to which it applied, since the neighboring States of New Jersey and Connecticut had no income tax in effect, and at the same time providing that that increase in tax burden should be greater for non-residents than for residents. The New York law was accordingly held to violate the privileges and immunities clause of the Federal Constitution. The balance of the opinion in *Travis* confirmed the principles enunciated in *Shaffer* v. *Carter*, *supra*, and added that the operation of a withholding provision for the collection of the tax was not a factor cognizable for purposes of determining constitutionality. *Travis* v. *Yale & Towne Mfg. Co.* does not support the appellants' contention that the New Hampshire Commuters Income Tax, which effects no increase in tax burden upon anyone,

resident or non-resident, violates the privileges and immunities clause; rather, as the New Hampshire Supreme Court noted in its opinion below, *Travis* confirms the fundamental principles of State taxing jurisdiction upon which RSA 77-B is grounded.

The due process clause of the Fourteenth Amendment provides no objection to the tax challenged herein. The only requirement of due process is that the tax imposed bear some fiscal relation to the protection, opportunities and benefits given by the state. *Wisconsin, et al* v. *J. C. Penney Co.*, 311 U.S. 435; 61 S. Ct. 246 (1940). Even multiple taxation of the same income by different states need not violate due process. *State Tax Commission of Utah* v. *Aldrich, et al*, 316 U.S. 174; 62 S. Ct. 1008 (1942). *Shaffer* v. *Carter, supra.*

The equal protection clause, in like manner, affords no grounds for attack upon RSA 77-B. The power to tax is an attribute of state sovereignty, and,

> Although the wide discretion as to classification retained by a legislature often results in narrow distinction, these distinctions, if reasonably related to the object of the legislation, are sufficient to justify the classification. *German Alliance Ins. Co.* v. *Lewis*, 233 U.S. 389, 418. 34 S. Ct. 612 (1914).

Furthermore, the practical, rather than the theoretical, effect is the standard by which tax statutes are to be measured.

> [t]he constitutional prohibition applies only to taxation which in fact bears unequally on persons or property of the same class and that mere differences in modes of assessment do not deny equal protection unless they are shown to produce such inequality. *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U.S. 232, 236. 10 S. Ct. 533 (1890).

As noted in the opinion below, the source of revenue reached by RSA 77-B is, for lack of personal jurisdiction over non-residents, the only source available from which to assess and effect the "ratable contribution in taxes for the support of the government." *Shaffer* v. *Carter, supra.*

Finally, in commenting upon the breadth of the power of states to make classifications for tax purposes, the Supreme Court in *Madden, Executor* v. *Kentucky*, 309 U.S. 83; 60 S. Ct. 406, (1940) said:

> . . . the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.

We submit that that burden has not been met by the appellants in this case, and that their appeal presents questions so unsubstantial as not to need further argument.

Respectfully submitted,

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September 5, 1974